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No. 98-1648

IN THE SUPREME COURT OF THE UNITED STATES

GUY MITCHELL, et al.,

Petitioners,

v.

MARY L. HELMS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF OHIO, COLORADO, FLORIDA, IOWA, ILLINOIS, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW JERSEY, SOUTH CAROLINA, AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI* INTEREST AND SUMMARY OF ARGUMENT

Ohio and 12 other *amici* States write in support of petitioners, urging this Court to hold that the government does not violate the Establishment Clause by loaning computers, software, library books and other secular materials to religious and secular schools alike. The States have an immediate and direct interest in the outcome of this case. Many States, like Louisiana, receive federal funding through the Chapter 2 program at issue. Many States also have laws, or are considering enacting laws, that also distribute funds to religious and secular schools on a neutral basis in order to advance secular interests. The States also have an abiding interest in protecting their citizens and institutions from any form of religious discrimination.

The ruling of the U.S. Court of Appeals for the Fifth Circuit below jeopardizes these interests. Although it cited in its holding two decisions of this Court, the Fifth Circuit ignored the broad mandate of neutrality and equality that time and again —and in more recent times increasingly—has guided Establishment Clause jurisprudence. Quite simply, the only funding programs allowed under the Fifth Circuit's Establishment Clause regime would have to practice blatant discrimination against schools and parents based upon religious affiliation, belief and viewpoint. The Constitution calls for the opposite.

ARGUMENT

I. The Principle Of Non-Discrimination Is And Should Remain The Guiding Light In Applying The Establishment Clause To Distribution Of Government Benefits.

The *amici* States urge that the Establishment Clause, along with the complementary constitutional guarantee of free exercise, the prohibition of religious tests for office (art. VI, cl. 3), and the explicit Fourteenth Amendment guarantee of equal protection of the laws, "all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring). The Free Speech Clause as well enforces equality by condemning viewpoint discrimination in a limited public forum, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Equal treatment is of particular importance in the context of applying the Religion Clauses of the First Amendment to the States, because the prohibition of establishment and the guarantee of free exercise are incorporated elements of Section 1 of the Fourteenth Amendment, alongside that Section's express provision that a State may not "deny to any person within its jurisdiction the equal protection of the laws."

Government neutrality and equality of treatment have long guided Religion Clause jurisprudence. In *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Court endorsed equal participation of religious hospitals in a neutral federal program that provided public funds to private hospitals for the secular purpose of saving lives and improving health care. The very first case to apply the incorporated Establishment Clause to the States, *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), upheld public bus transportation of public and parochial

students on an equal basis and emphasized that the State may not exclude persons "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation" (emphasis in original). The same principle applies to a neutral program that provides benefits to religious and non-religious care and counseling services on equal terms for the secular purpose of making available such services, *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). Nor does the Establishment Clause mandate discrimination against religious groups by denying them equal access to school facilities. *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

Also upheld by the Court are tax breaks that even-handedly confer benefits with respect to religious and non-religious education, *Mueller v. Allen*, 463 U.S. 388 (1983), or general non-profit activities, *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). *Compare Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989) (plurality opinion recognizing that neutral tax exemption applicable to religious and non-religious materials alike would pass Establishment Clause muster), *id.* at 27-28 (Blackmun, J., concurring, to the same effect).

On the other side of the coin, but reflecting the same concern for equality, are those cases where religious discriminations have been condemned. *McDaniel v. Paty*, 435 U.S. 618 (1978) (unconstitutional to bar ministers as such from sitting in state legislature or in state constitutional convention); *Rosenberger*, *supra* (exclusion of student publication expressing religious viewpoint from student funding violated free speech rights); *Widmar v. Vincent*, 454 U.S. 263 (1981) (discriminatory exclusion of religious student group from equal access to university facilities violates free speech guarantee); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (discriminatory exclusion of religious film from equal access to school facilities a violation of free speech). *See also Grumet*, 512 U.S. at 717 (1994) (O'Connor, J.,

concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion.") (emphasis added).

Finally, equal treatment of genuinely individual choices in disposing of government aid remains the rule even where religious alternatives are selected, because those individual choices prevent any implication that the government itself is sponsoring religion. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (State need not deny vocational education grant where student elected to go to religious college to train for ministry); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (government-paid sign interpreter could be provided to assist student's study at sectarian school); *Agostini v. Felton*, 521 U.S. 203 (1997) (government-paid teachers could provide remedial education services to disadvantaged students in religious schools).

II. The Principle Of Non-Discrimination Accords With The History And Underlying Philosophy Of The Establishment Clause.

In *Rosenberger*, several Justices of this Court extensively debated whether the original history of the Establishment Clause demonstrated an intent to prohibit religious schools from receiving government subsidies pursuant to neutral eligibility requirements. 515 U.S. at 852-63 (Thomas, J., concurring); *id.* at 868-73 (Souter, J., dissenting). Perhaps the most important point that emerges from this debate is that the historical record is inconclusive, and reasonable minds today can differ both about what Madison meant in his Memorial and Remonstrance and how authoritative that Memorial is for purposes of determining the meaning of the Establishment Clause. In the absence of a definitive historical answer to the question of whether the authors of the First Amendment specifically intended to exclude religious schools

from neutral subsidies, this Court must look to general principles of First Amendment jurisprudence to resolve this question. Those general principles, as we have already explained, point to the conclusion that it would be wrongful discrimination to exclude religious schools from a neutral subsidy. *Accord Grumet*, 512 U.S. at 715 (O'Connor, J., concurring) (expressing opinion that the "emphasis on equal treatment" in Establishment Clause precedents is "n eminently sound approach"; *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.").

Although we are by no means professional historians, and thus tread lightly in an area outside our professional expertise, we wish to add a few observations to the historical discussion. First, with regard to the Virginia bill that was the object of Madison's Memorial, there seems no way to construe it as neutral between religious and nonreligious schools, even on the most favorable interpretation of its language. Second, most of Madisons objections, although perhaps not all, concern the Virginia bill's religious favoritism, or lack of neutrality. Given these points, there is no compelling need to construe the Establishment Clause as *requiring* discrimination against religious schools. Moreover, absent such compulsion it would be anomalous—and contrary to the tenor of Madison's remarks —to interpret the Establishment Clause in a way that would contradict the equal freedom of individuals to believe whatever theological propositions they find most convincing.

In understanding the Virginia bill that Madison opposed, it is worth observing, first, that its purpose, as stated in the very text of the bill, was to promote the teaching of Christianity: "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men,

restrain their vices, and preserve the peace of society ... Be it therefore enacted by the General Assembly, that for the support of Christian teachers [a certain tax be collected]." *Everson v. Board of Education*, 330 U.S. 1, 72 (1947) (Supplemental Appendix) (italics omitted). Indeed, the very title of the bill was "A Bill Establishing A Provision For Teachers of the Christian Religion." *Id.* Quite obviously, then, the purpose of this bill was not strictly impartial between religious and nonreligious education.

Moreover, had this bill been adopted, its apparent effect would have been to grant special financial benefits to religious schools that would not have been available on equal terms to nonreligious schools. According to its terms, the bill would have operated by asking taxpayers to designate the particular "society of Christians" they wished to receive their tax payments. *Id.* at 73. Thus, Baptist taxpayers could assign their tax payments to a Baptist church, while Catholic taxpayers could assign their tax payments to a Catholic church, and so forth. The churches, or other Christian "societies," that received these designated tax revenues were then obligated to use these funds solely to pay for "a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship." *Id.* at 74.

If a taxpayer failed to designate a particular religious society to receive his tax payments, this money was to be placed in the state's treasury to be used, as the state legislature subsequently directed, "for the encouragement of seminaries of learning" within the state. *Id.* It is unclear exactly how this provision of the bill would have worked if the bill had gone into effect. But it is clear that its overall effect was not neutral between religious and nonreligious schools. Under the bill, nonreligious taxpayers could not designate that their tax payments be sent to the specific nonreligious school of their choice. Thus, nonreligious schools could receive only those

funds that had not been designated by taxpayers for religious schools.

Accordingly, religious schools would have received *all* the designated tax payments *plus* a pro rata share of the undesignated tax payments, while nonreligious schools would have received *only* a pro rata share of the undesignated funds. Even under the most favorable interpretation of the bill, then, its overall effect would have left these nonreligious schools at a significant financial disadvantage.

Moreover, Madison objected to this bill precisely because it was not neutral regarding religion. In his famous Memorial and Remonstrance attacking the bill, Madison observed that "the bill violates that *equality* which ought to be the basis of every law." *Everson*, 330 U.S. at 66 (Appendix) (emphasis added). He went on to address the specific requirement that all citizens have equal rights with respect to matters of religious faith:

> Above all are [persons] to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of conscience.' Whilst we assert for ourselves a freedom to embrace, to profess, and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.

Id. (footnote omitted) (emphasis supplied by Madison).

And, again, Madison specifically objected that the assessment bill "degrades from the equal rank of Citizens all those whose opinions in religion do not bend to those of the Legislative authority." *Id.* at 69. Thus, Madison repeatedly

emphasized the requirement that no citizen be discriminated against on account of his or her religious beliefs or disbeliefs. Given Madison's repeated emphasis on this strict nondiscrimination requirement, there is no reason to believe that Madison necessarily would have objected to a law that was strictly neutral among religious and nonreligious schools.

Thus, once again, absent conclusive historical evidence that would compel the government to discriminate against religious believers when adopting secular funding programs, the better interpretation of the Establishment Clause—the interpretation that accords more closely with the fundamental values underlying the First and Fourteenth Amendments generally—is the interpretation that permits the government to include religious believers equally in a nondiscriminatory funding program. *See Grumet*, 512 U.S. at 714 (O'Connor, J., concurring) ("We have time and again held that the government may not treat people differently based on the God or gods they worship, or do not worship.").

III. The Federal Funding At Issue Is Constitutional Where It Is Administered In Accordance With The Statutes On A Non-Discriminatory Basis.

This particular case presents a program that, on the face of the enabling statutes, distributes school aid on a neutral basis. Federal block grants are bestowed upon the "state education agencies" on the basis of student populations of the respective states, and further allocation to "local education agencies" then occurs based once more upon student populations, with special emphasis on disadvantaged students. 20 U.S.C. 7301, 7311, 7312. Funds are applied to acquire supplemental educational materials, which are made available to students, while title is retained by the public agency. 20 U.S.C. 7372(c)(1).

Private school students benefit from the distributions on an equal basis with those in public schools, and no discrimination is made against schools with a religious affiliation. 20 U.S.C. 7372(a). In this respect, the federal aid program is functionally equivalent to the aid program upheld in *Agostini*. In *Agostini*, the Court upheld a strictly neutral aid program because it created no incentive to choose religious instead of non-religious education, leaving the matter entirely to parental choice. *Agostini*, 512 U.S. at 209-214 (describing a parallel federal aid program supporting provision of remedial services to disadvantaged children). The same point applies equally to this neutral aid program.

Consistent with the program's proclaimed goal of improving educational opportunities, the program also restricts materials to the "secular, neutral and nonideological." 20 U.S.C. 7372(a). On its face, this constitutes an even-handed prohibition against using funds for special indoctrination, be it political, philosophical or religious in nature. Where so administered, the provision serves the goal of neutrality and allows the funds to promote learning generally, while avoiding narrow governmental support of one voice or other that may be advocating in the marketplace of ideas. Moreover, any interference with the educational mission of specific schools caused by this provision is minimal, since the funds are restricted to providing strictly "supplement[al]" assistance and must not "supplant funds from non-federal sources," 20 U.S.C. 7371(b). (But should the Court find an "entanglement" problem with any monitoring of content that this provision might require, then this provision should yield to the general principle that the government may provide benefits on a strictly neutral and non-discriminatory basis, according to secular criteria, and religious schools may participate in the benefits program on equal terms as non-religious schools, where the program creates no incentive to choose a religious, rather than non-religious school, and thus the decision to choose a religious

school is solely a matter of private choice. *See, e.g., Agostini*, 521 U.S. at 231; *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487-88, and *Mueller* 463 U.S. at 399.)

When carried out in accordance with its statutory mandates, this funding constitutes non-discriminatory governmental support that enhances educational opportunities across the board for millions of American children, regardless of creed or affiliation of schools. Such neutral pursuit of legitimate secular objectives comports with the Religion Clauses, and should be held constitutional.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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